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In the Supreme Court of the United States

SANTA FE INDEPENDENT SCHOOL DISTRICT, PETITIONER,

v.

JANE DOE, ET AL., RESPONDENTS.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF FOR THE CHRISTIAN LEGAL SOCIETY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the Establishment Clause permits a public school district to allow student volunteers selected on the basis of secular and neutral criteria to deliver a message or invocation of their choice as part of the pre-game activities at high school football games.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Christian Legal Society ("CLS"), founded in 1961, is a nonprofit interdenominational association of more than 4,000 Christian attorneys, law students, law professors, and judges. CLS has chapters in nearly every State and at more than 140 accredited law schools.

Since 1975, CLS's legal advocacy and information arm, the Center for Law and Religious Freedom, has worked to protect the religious liberty of all individuals and organizations, both Christian and non-Christian, in courts across the Nation. Using a network of volunteer attorneys and law professors (along with its full-time staff), the Center provides accurate information to the public and political branches concerning the interaction of law and religion. Since 1980, the Center has filed *amicus* briefs in virtually every case before this Court involving church-state relations.

CLS has been particularly active in efforts to protect the rights of those who wish to engage in private religious expression on equal terms with other private speakers. CLS's staff was instrumental in drafting the Equal Access Act, 20 U.S.C. §§ 4071-4074, which this Court sustained in *Board of Education* v. *Mergens*, 496 U.S. 226 (1990). See 128 CONG. REC. 11784-11785 (1982) (Sen. Hatfield). Similarly, CLS was a principal author of *Religion in the Public Schools: A Joint Statement of Current Law*, which served as the basis for the U.S. Department of Education's guidance letters on *Religious Expression in Public Schools*. For these reasons, CLS has a vital interest in the outcome of this case.

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[1] The parties have consented to the filing of this brief. Copies of the letters of consent have been lodged with the Clerk of the Court. This brief was not authored in whole or in part by counsel for a party, and no person or entity, other than the *amicus curiae*, its members, and its counsel has made a monetary contribution to the preparation and submission of this brief.

SUMMARY OF ARGUMENT

This brief addresses one of the most difficult issues arising under the First Amendment: in what circumstances is speech that takes place in the context of a public event fairly attributable to the state? This question is vitally important to a coherent theory of the Religion Clauses. An overly broad view of *government* speech would impose the restraints of the Establishment Clause on private speakers—thus requiring the elimination of private religious voices from public life. An overly broad view of *private* speech would nullify constitutional restraints on the power of government—thus permitting the state to engage in religious activity. A proper resolution of cases such as this therefore requires recognition of the "crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect." *Board of Educ.* v. *Mergens*, 496 U.S. 226, 250 (1990) (plurality opinion).

Two inquiries determine whether religious speech is attributable to the state. First, this Court asks whether the criteria by which speakers are selected are genuinely secular and neutral toward religion. Where the means of selecting speakers are "skewed toward religion" or tip the balance in favor of religious speech, they violate the principle that the state may not favor religion over nonreligion. Second, the Court asks whether the speakers retain control over their messages, and in particular the selection of religious content. When the state controls the content of a message, one may fairly say that the state itself is speaking. In contrast, when private speakers retain control over their remarks, the state cannot be said to have approved them—regardless of whether their content is religious.

We believe that the football policy here, on its face, satisfies these mandates. Nothing in the policy encourages

students to elect speakers on the basis of non-neutral criteria; there has been no showing that Petitioner (the "District") reviews student messages for religious content; and insofar as the students retain control over their statements, they are free to make either secular or religious remarks. Without more, this does not violate the Establishment Clause.

ARGUMENT

I. THE DISTINCTION BETWEEN STATE ACTION ADVANCING RELIGION AND PRIVATE ACTION ADVANCING RELIGION IS CRITICAL TO THE PROTECTION OF RELIGIOUS LIBERTY.

It is well settled that the provisions of the Constitution, with the exception of the Thirteenth Amendment, run solely against the state. The very language of the Fourteenth Amendment—"No State shall * * * deprive any person of life, liberty, or property, without due process of law"—by which the First Amendment is made applicable to the States, bespeaks its application to the government. In keeping with this language, this Court has always maintained, ever since the issue first arose in the *Civil Rights Cases*, 109 U.S. 3 (1883), that "'the action inhibited by the first section of the Fourteenth Amendment is only such action as may fairly be said to be that of the States.'" *Blum* v. *Yaretsky*, 457 U.S. 991, 1002 (1982) (quoting *Shelley* v. *Kraemer*, 334 U.S. 1, 13 (1948)). The Fourteenth Amendment "erects no shield against merely private conduct." *Shelley*, 334 U.S. at 13.

The distinction between private and governmental action (the "state action" doctrine) serves important constitutional purposes. Most important, it recognizes that constitutional norms that are liberty-enhancing when applied to the state may be liberty-infringing when applied to private parties. Just as imposing an obligation of content neutrality upon the state *enhances* the expressive liberty of private citizens,

Carey v. *Brown*, 447 U.S. 455 (1980), imposing such an obligation on private parties would *interfere* with such liberty, *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Group*, 515 U.S. 557 (1995). Likewise, while imposing a religious nondiscrimination requirement on the state *increases* religious freedom, *Church of Lukumi Babalu Aye* v. *City of Hialeah*, 508 U.S. 520 (1993), imposing such a requirement on private religious organizations *diminishes* such freedom, *Corporation of Presiding Bishop* v. *Amos*, 483 U.S. 327 (1987). Limitations that make sense when applied to the state—which possesses substantial coercive power over its citizens—would be highly disruptive if applied to private citizens or other organizations that lack such power.[2]

The distinction between state and private action is particularly important to a coherent view of the Religion Clauses:

> The very same conduct can be either constitutionally protected or constitutionally forbidden, depending on whether those who engage in it are acting in their "private" or their "public" capacities. If a group of people get together and form a church, that is the free exercise of religion. If the government gets together and forms a church, that is an establishment of religion. One is protected; one is forbidden. It is inconceivable that we could construct a theory of freedom of religion which does not distinguish at some level between the activities of the individual believer and the activities of the sovereign.

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[2] See also *Rust* v. *Sullivan*, 500 U.S. 173, 193-194 (1991) (where private parties are enlisted to convey the government's message, free speech guarantees do not apply); *Eu* v. *San Francisco County Democratic Central Comm.*, 489 U.S. 214, 224-225 (1989) (applying political neutrality requirements to a political party would interfere with private advocacy).

Michael W. McConnell, *"God is Dead and We Have Killed Him!": Freedom of Religion in the Post-Modern Age*, 1993 B.Y.U. L. REV. 163, 184, 185.

We do not mean that there are no hard cases at the margins. Our point is simply that much is at stake whenever this Court draws a line between private and governmental religious activity, because the Constitution protects one and forbids the other. *E.g.*, *Mergens*, 496 U.S. at 250. Our primary aim in filing this brief is thus to propose reliable principles to guide this determination as it relates to religious speech at public events.

A. This Court's Decisions Confirm That The State Itself May Not Engage In Religious Exercise Or Advance Inherently Religious Messages.

This Court has long held that the Establishment Clause bars the state from engaging in religious exercise.[3] Some 50 years ago, the Court struck down a program granting clergy special access to public school students, to offer curricular "classes in religious instruction." See *McCollum* v. *Board of Educ.*, 333 U.S. 203, 207 (1948). Noting that the state may not "'pass laws which aid one religion, aid all religions, or prefer one religion over another,'" the Court held that this principle was violated by providing clergy the "invaluable aid" of preferential access to public school students. *Id.* at

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[3] In acknowledging that the state may not advance religious messages or engage in religious exercises, we mean those messages and exercises that are *inherently* religious. The Court has repeatedly made clear that "the 'Establishment' Clause does not ban federal or state regulation of conduct whose reason or effect merely happens to coincide or harmonize with the tenets of some or all religions." See *McGowan* v. *Maryland*, 366 U.S. 420, 442 (1961); see also *Harris* v. *McRae*, 448 U.S. 297, 319-320 (1980); *Bowen* v. *Kendrick*, 487 U.S. 589, 604 n.8, 613 (1988).

210, 212. As the Court later explained, *McCollum* is a case in which school officials "permitt[ed] school facilities to be used for instruction by religious groups, but *not* by others." *Widmar* v. *Vincent*, 454 U.S. 263, 272 n.10 (1981).

Similarly, in *Engel* v. *Vitale*, 370 U.S. 421, 423 (1962), the Court invalidated state laws "direct[ing] the use of prayer in public schools." The founders recognized that "one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services." *Id.* at 429. Applying this principle, the Court held that "neither the power nor the prestige" of the state may "be used to control, support or influence the kinds of prayer the American people can say." *Id.* at 429. The state is "without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity." *Id.* at 430.

One year later, the Court addressed the validity of laws requiring public schools to begin the day with Bible readings and prayer. *School Dist.* v. *Schempp*, 374 U.S. 203, 205, 223 (1963). Again stating that "the Government [must] maintain strict neutrality, neither aiding nor opposing religion," the Court explained that "the concept of neutrality * * * does not permit a State to require a religious exercise." *Id.* at 225. The Court had no objection to "study of the Bible or of religion, when presented objectively as part of a secular program of education,"[4] but invalidated making "religious

[4] For a statement on appropriate use of the Bible for educational purposes, see *The Bible & Public Schools: A First Amendment Guide* (1999), which CLS co-authored, and which is endorsed by President Clinton and some twenty religious and civil liberties organizations. See www.freedomforum.org.

exercises" a part of "curricular activities" conducted "under the supervision and with the participation of teachers." *Id.* at 223, 225. Such activity was "state action," and therefore barred by the Establishment Clause. *Id.* at 205.

Most recently, in *Lee* v. *Weisman*, 505 U.S. 577 (1992), this Court addressed an establishment challenge to a district's practice of inviting clergymen to deliver invocations and benedictions at its middle school graduation ceremonies. In addition to the obligatory nature of such events, the Court explained that "[t]hese dominant facts mark and control the confines of our decision: State officials direct the performance of a formal religious exercise at promotional and graduation ceremonies for secondary schools." *Id.* at 586. The Court was especially troubled by the principal's involvement in deciding to include prayers in the ceremony, in selecting clergy to deliver them, and in directing their content. *Id.* at 586-590. In such circumstances, the prayers "bore the imprint of the State," and the "constitutional constraints applied to state action" required invalidating the practice. *Id.* at 590, 595.

The *Weisman* decision was careful, however, to distinguish between governmental prayer and prayer that is privately initiated. The "Religion Clauses mean that religious beliefs and religious expression are too precious to be either proscribed or prescribed by the State," the Court stated, and it follows that "school officials [may not] assist in composing prayers as an incident to a formal exercise for their students." 505 U.S. at 590. "[T]hough the First Amendment does not allow the government to stifle praye[r]," "neither does it permit the government to undertake that task for itself." *Id.* at 589.

From *McCollum* to *Weisman*, this Court's decisions have consistently recognized that it is harmful to genuine religious exercise for the state to engage in religious activity. As

James Madison wrote in his *Memorial and Remonstrance Against Religious Assessments*:

> [E]xperience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of Religion, have had a contrary operation. During almost fifteen centuries, has the legal establishment of Christianity been on trial. What have been its fruits? More or less in all places, pride and indolence in the Clergy; ignorance and servility in the laity; in both, superstition, bigotry and persecution. Enquire of the Teachers of Christianity for the ages in which it appeared in its greatest lustre; those of every sect, point to the ages prior to its incorporation with Civil policy.

Quoted in Appendix to dissenting opinion of Rutledge, J., in *Everson* v. *Board of Educ.*, 330 U.S. 1, 63, 67-68 (1947).

One need look no further than *Weisman* for a case in point. To ensure that Rabbi Gutterman offered a prayer that was "[a]ppropriate" to a graduation ceremony, the principal provided him "with a pamphlet entitled 'Guidelines for Civic Occasions'"—which "recommend[ed] that public prayers at nonsectarian civic ceremonies be composed with 'inclusiveness and sensitivity'"—and "advised him the invocation and benediction should be nonsectarian." 505 U.S. at 581.

It is easy to see the corrupting influence of the state in these circumstances. Government officials' views on what is "proper" in prayer are understandably driven not by religious concerns but by civic and political concerns regarding the perceived sensibilities of those attending. What is inclusive today may be exclusionary tomorrow, and what one official deems tolerant or appropriate may strike another as offensive. No one should be asked (let alone required) to conform his prayer to the wishes of the governing authority. And religious citizens, no less than secular ones, should be

alarmed by governmental control over religious expression such as prayer.

The notion that the state may establish a "civic religion" is as much an affront to religious liberty as an outright preference for one sect over another. See *Weisman*, 505 U.S. at 590. Since the government is "without power" to declare which types of prayer are appropriate (*Engel*, 370 U.S. at 430), it is no less (and no more) of an establishment of religion for the state to direct performance of "nonsectarian" and "nonproselytizing" prayer than it would be for the state to direct performance of "exclusionary" and "offensive" prayer. If the state is speaking, it may not offer a prayer.

B. This Court's Decisions Also Confirm That The Establishment Clause Provides No Warrant For Interfering With Private Religious Speech.

While holding fast to the principle that the state may not itself engage in religious exercise or favor religious over secular speech, this Court's "precedent [also] establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995).

In its landmark decision in *Widmar* v. *Vincent*, 454 U.S. 263 (1981), the Court expressly rejected arguments that a public university could "discriminate against religious speech on the basis of its content," or provide such speech with "less protection than other types of expression." *Id.* at 267. The state's asserted interest "in achieving greater separation of church and State than is already ensured under the Establishment Clause of the Federal Constitution," the Court explained, "is limited by the Free Exercise Clause and in this case by the Free Speech Clause as well." *Id.* at 276. Thus, the state may not deny religious students equal access to its

property because they seek to use the property "'for purposes of religious worship or religious teaching.'" *Id.* at 265.

In 1990, the Court turned away establishment challenges to the Equal Access Act, 20 U.S.C. §§ 4071-4074, which requires public secondary schools to grant religious noncurricular groups the same privileges that they grant to secular groups. *Mergens*, 496 U.S. at 247. Writing for a four-Justice plurality, Justice O'Connor rejected claims that recognizing a "Christian club" "would effectively incorporate religious activities into the school's official program" or "provide the club with an official platform to proselytize other students." *Id.* at 247-248 "The proposition that schools do not endorse everything they fail to censor is not complicated," the plurality stated, and "secondary school students are mature enough and are likely to understand that a school does not endorse or support student speech that it merely permits on a nondiscriminatory basis." *Id.* at 250. "Although a school may not *itself* lead or direct a religious club," it continued, "a school that merely *permits* a student-initiated and student-led religious club to meet after school, just as it permits any other student group to do, does not convey a message of state approval or endorsement of the particular religion." *Id.* at 252 (emphasis added). See also *id.* at 260-261 (Kennedy, J., concurring in part and in judgment).

In 1993, this Court unanimously held that "it discriminates on the basis of viewpoint"—and thus "violates the Free Speech Clause of the First Amendment"—"to permit school property to be used for the presentation of all views about family issues and child rearing except those dealing with the subject matter from a religious standpoint." *Lamb's Chapel* v. *Center Moriches Sch. Dist.*, 508 U.S. 384, 387, 393 (1993). There, state officials sought to keep a church from obtaining after-hours access to its schools "on the ground that to permit its property to be used for religious purposes would

be an establishment of religion forbidden by the First Amendment." *Id.* at 394. But given the "variety of private organizations" that used the school for comparable purposes, the Court held that mere "fears of an Establishment Clause violation" provided no warrant for discriminating against privately initiated religious speech. *Id.* at 395.

In 1995, the Court rejected a claim that the state "violates the Establishment Clause when, pursuant to a religiously neutral state policy, it permits a private party to display an unattended religious symbol in a traditional public forum located next to its seat of government." *Pinette*, 515 U.S. at 757. Noting that "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince," the Court again reaffirmed that "private expression" may not be curtailed to serve some purportedly "compelling interest in complying with the Establishment Clause" or "avoiding official endorsement of Christianity." *Id.* at 760, 761, 762.

Justice Scalia, writing for a four-Justice plurality, stated that the Establishment Clause "applies only to the words and acts of *government*. It was never meant, and has never been read by this Court, to serve as an impediment to purely *private* religious speech connected to the State only through its occurrence in a public forum." *Pinette*, 515 U.S. at 767. Writing for three concurring Justices, Justice O'Connor stated a similar view: the Establishment Clause is satisfied "where truly private speech is allowed on equal terms in a vigorous public forum that the government has administered properly." *Id.* at 775.[5]

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[5] The Court in *Pinette* commented that "[t]here is no doubt that compliance with the Establishment Clause is a state interest sufficiently compelling to justify content-based restrictions on

Finally, on the same day that it decided *Pinette*, the Court held that the Establishment Clause does not permit "'a state university to exclude an otherwise eligible student publication from participation in the student activities fund, solely on the basis of its religious viewpoint, where such exclusion would violate the Speech and Press Clauses if the viewpoint of the publication were nonreligious.'" *Rosenberger* v. *Rector of Univ. of Va.*, 515 U.S. 819, 837 (1995). There, school officials sought to deny funding to *Wide Awake*, a newspaper that addressed campus issues from a "Christian viewpoin[t]," claiming this was "excused by the necessity of complying with the Constitution's prohibition against state establishment of religion." *Id.* at 826, 837. Once again, the Court "rejected the position that the Establishment Clause even justifies, much less requires, a refusal to extend free speech rights to religious speakers." *Id.* at 839.

The Court agreed that the Establishment Clause applies where "the State is the speaker"—either because it "enlists private entities to convey its own message" or "determines

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speech." 515 U.S. at 761-762. As discussed in text (at 17), we believe this analysis misses the point: if speech that is *attributable to the state* advances religion, the Establishment Clause compels the state to stop; but if *private speakers* advance religion, the mandates of the Establishment Clause *are not even triggered*. Properly interpreted, therefore, there would never be a situation where the Establishment Clause requires one result and the Free Speech Clause requires another, forcing the Court to choose between the Clauses. See Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 IOWA L. REV. 1, 83-86 (1998); Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 331 (1996). *Cf.* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 14-8, at 1201 (2d ed. 1988) (in case of conflict, "the free exercise principle should be dominant [over] the anti-establishment principle").

[its] content." But "[i]t does not follow * * * that viewpoint-based restrictions are proper when the [state] does not itself speak or subsidize transmittal of a message it favors." *Rosenberger*, 515 U.S. at 833, 834. When the state allocates speech opportunities on the basis of "neutral criteria and evenhanded policies," "the guarantee of neutrality is respected, not offended." *Id.* at 839. Absent proof that it "created [such criteria] to advance religion or adopted some ingenious device with the purpose of aiding a religious cause," "[t]here is no Establishment Clause violation in [the State's] honoring its duties under the Free Speech Clause." *Id.* at 840, 846.

1. Use of public property or resources does not itself make private speech attributable to the state.

In none of these cases, from *Widmar* to *Rosenberger*, did this Court find an establishment because a speaker wished to express a religious message on public property or by using other public resources. The Court in *Mergens* held that religious students were entitled to equal "access to the school newspaper, bulletin boards," and "public address system" (496 U.S. at 247), and the Court in *Rosenberger* held that religious students were entitled to equal access to the campus "computer facility," "printer," and "copy machine." 515 U.S. at 843. To be sure, speech given at public events is less "private" than speech in homes or churches. But when "permission [is] requested through the same application process and on the same terms required of other private groups," the fact that "expression [is] made on government property" is of no moment. *Pinette*, 515 U.S. at 763; *id.* at 765-766 (plurality opinion).

If using state resources made a private speaker's message the state's, *all* of these cases would have come out the other way. *Widmar* and *Lamb's Chapel* involved use of public property for worship and/or religious teaching; *Mergens*

involved use of a public high school and its amenities for a Christian club; *Pinette* involved an unattended religious display near the very seat of government; and *Rosenberger* involved public funding of an evangelical newspaper. The court below thus erred in ruling that the policy here is invalid because it allows use of "government-owned appliances and equipment, on government-controlled property." Pet. App. A24. Student speech is protected whether it occurs "in the cafeteria," "on the campus," or "on the playing field." *Tinker* v. *Des Moines Sch. Dist.*, 393 U.S. 503, 512-513 (1969).

2. *Private religious speech may not be censored simply because it is "offensive" to those in attendance.*

It is also untenable to suggest that religious messages may be censored because they might be offensive to those in attendance. The Establishment Clause protects citizens from the offense of being "subjected to *state-sponsored* religious exercises." *Weisman*, 505 U.S. at 592 (emphasis added).[6] But privately initiated speech is another matter. As the Court held in *Tinker*, "[i]n order for * * * school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." 393

[6] Any claim that the policy here is invalid because it applies to football games rather than graduations (or vice versa) strikes us as unrelated to the purposes of the First Amendment. Private speech may not be censored solely on account of the sensitivity of the audience, which is likely to vary greatly from setting to setting. The important question is whether the government has given preference to religious speakers or enlisted otherwise private speakers to deliver its own religious message.

U.S. at 509. "People may take offense at all manner of religious as well as nonreligious messages," but "offense alone" does not violate the Establishment Clause. *Weisman*, 505 U.S. at 597.[7]

3. *If private religious speech were misattributed to the state, the proper remedy would be to require a neutral disclaimer, not to censor the speech.*

Even if the Court perceives an unreasonable risk that observers will wrongly attribute to the state speech that is privately initiated, the proper remedy is not to silence private speakers, but to make the state disclaim sponsorship of their messages. As the Seventh Circuit has observed:

> Public belief that the government is partial does not permit the government to become partial. * * * The school's proper response is to educate the audience rather than squelch the speaker. * * * Schools may explain that they do not endorse speech by permitting it. If pupils do not comprehend so simple a lesson, then one wonders whether the * * * schools can teach anything at all.

[7] See also *Street* v. *New York*, 394 U.S. 576, 592 (1969) ("It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers"); *Texas* v. *Johnson*, 491 U.S. 397, 409 (1989); *Whitney* v. *California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring); *Gitlow* v. *New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting). See also LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-10, at 852 (2d ed. 1988) ("One must begin with the premise that government may not justify the suppression of speech because its content or mode of expression is offensive to some members of the audience").

Hedges v. *Wauconda Community Sch. Dist.*, 9 F.3d 1295, 1299-1300 (7th Cir. 1993).

Here, for example, a court might require the District to place a written disclaimer in its game program, explaining how students are selected and stating that the District is not the sponsor of their pre-game messages. See *Pinette*, 515 U.S. at 782 (O'Connor, J., concurring in judgment) (a "reasonable observer * * * would certainly be able to read and understand an adequate disclaimer"); accord *id.* at 794 (Souter, J., concurring in judgment). Or the District might be asked to announce that speakers have been elected by their peers to deliver a message of their choice, which it does not endorse. Such disclaimers would notify "informed member[s] of the community" that the state is not responsible for what is said (*id.* at 781 (O'Connor, J., concurring in judgment)), while ensuring that restrictions on speech are the "most 'narrowly drawn'" means of achieving this objective. *Id.* at 793 (Souter, J., concurring in judgment).

We do not believe that disclaimers are constitutionally required where speakers are selected on a secular, neutral basis and retain control over their speech. Such speakers are not state actors, and the commands of the First Amendment run solely against the state. If the state wishes to disclaim private religious speech, however, it should disclaim secular speech as well. *Pinette*, 515 U.S. at 769 (plurality opinion) (state may not "discriminate against [private religious speech] by requiring religious speech alone to disclaim public sponsorship"); *id.* at 794 (Souter, J., concurring in judgment) (approving disclaimer of all "private speech" as "carrying no endorsement from the State"). The government "must treat religious speech by private speakers exactly like secular speech by private speakers." Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of*

Religious Speech by Private Speakers, 81 NW. U. L. REV. 1, 3 (1986).

C. Two Standards Govern Whether Religious Speech Is Attributable To The State: The Neutrality Of The State's Selection Criteria And The Degree Of State Control Over The Message.

The foregoing cases make two things clear: the state itself may not advance religious messages, but private religious messages are fully protected by the Free Speech and Free Exercise Clauses. This is not to say that the provisions of the First Amendment can ever be in "conflict."[8] Rather, both provisions serve to limit state influence on religious decisionmaking. Just as the state may not use its power to advance religious causes (or encourage private citizens to do so), neither may it discriminate against those who express religious messages on equal terms with other private speakers. The unifying principle is that the First Amendment's commands run solely *against the government and its agents*. The Court thus needs reliable means of determining whether speech given at public events falls on the governmental or private side of the equation.

A review of the two lines of decisions discussed above reveals that two principles explain how the Court determines whether to attribute religious speech in public settings to the

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[8] It is anachronistic to view the Free Exercise Clause as protecting religion from the government and the Establishment Clause as protecting the government from religion. See Esbeck, *supra* n.4, at 11-12, 82-84, 88. *Cf. Wallace* v. *Jaffree*, 472 U.S. 38, 68 (1985) (O'Connor, J., concurring in judgment) (noting that the "common purpose" of the Free Exercise and Establishment Clauses "is to secure religious liberty").

state. If both principles are satisfied, the Establishment Clause has not been violated.[9]

1. The neutrality of the selection criteria

First, the Court has asked whether the state's means of selecting speakers is genuinely neutral toward religion. When speakers are chosen based on "evenhanded" and "neutral criteria" that do not "promote," "encourage," or otherwise "favor one speaker over another," *Rosenberger*, 515 U.S. at 828, 833, 839, courts may be confident that the state is not favoring religion. Over time, if not immediately, neutral criteria should result in expression representing "the whole spectrum of speech, whether it manifests a religious view, an antireligious view, or neither." *Id.* at 841.

In contrast, where the government's selection criteria are "skewed towards religion," *Witters* v. *Washington Dep't of Servs.*, 474 U.S. 481, 488 (1986), "subsidize transmittal of a message it favors," or amount to "some ingenious device with the purpose of aiding a religious cause," *Rosenberger*, 515 U.S. at 834, 840, such criteria violate the neutrality that animates both the Establishment and Free Speech Clauses.

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[9] We do not suggest that these principles apply in *every* context. There are times when the state may properly act to facilitate voluntary religious exercise either by removing a burden on such exercise or without imposing burdens on nonadherents. In the military context, for example, the state "regulates the temporal and geographic environment of individuals to a point that, unless it permits voluntary religious services to be conducted with the use of government facilities" (and perhaps chaplains), "military personnel would be unable to engage in the practice of their faiths." *Schempp*, 374 U.S. at 226 n.10. We therefore urge the Court not to rule in a manner that addresses these issues.

Requiring the government to select speakers on the basis of neutral criteria permits the courts to determine whether such criteria are a pretext or subterfuge designed to enable government to favor religious speech. Both the plurality and concurring opinions in *Pinette* expressed concern over the prospect that terms of access to a public arena might not be *genuinely* neutral. Justice Scalia noted that "one can conceive of a case in which a governmental entity manipulates its administration of a public forum * * * in such a manner that only certain religious groups take advantage of it." 515 U.S. at 766 (plurality opinion).[10] Likewise, Justice O'Connor stated that the Establishment Clause is implicated by "preferential" treatment of religious expression, and that courts must take care to prevent "government manipulation of the forum." *Id.* at 776 (concurring opinion).

In light of these concerns, the *Weisman* Court held that when a public school "principa[l] decided that an invocation and a benediction should be given" at its middle school graduation, and "chose the religious participant" to deliver them, those choices were fairly "attributable to the State." 505 U.S. at 587. Rabbi Gutterman was chosen not on an evenhanded basis, but *precisely because* he would deliver a prayer. This is hardly neutral. Where the state "enlists private [persons] to convey its own message," it is as though "the State is the speaker." *Rosenberger*, 515 U.S. at 833.

On the other hand, secular criteria do not favor religion if the state is merely *aware* that religious speech may result from its policy. That would require state policymakers to

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[10] See also 515 U.S. at 766 (holding that "giving sectarian religious speech preferential access to a forum close to the seat of government (or anywhere else for that matter) would violate the Establishment Clause (as well as the Free Speech Clause, since it would involve content discrimination)").

adopt criteria designed *not* to result in religious speech. Moreover, "[e]ven if some legislators were motivated by a conviction that religious speech in particular was valuable and worthy of protection, that alone would not invalidate [a statute], because what is relevant is the legislative *purpose* of the statute, not the possibly religious *motives* of the legislators who enacted the law." *Mergens*, 496 U.S. at 249 (plurality opinion). If a policy reveals "a plausible secular purpose," "courts should generally defer to that stated intent." *Jaffree*, 472 U.S. at 74-75 (O'Connor, J., concurring in judgment).[11]

2. The degree of state control over the message

In addition to requiring the state to select speakers based on neutral criteria, this Court has examined the degree of state control over their speech. Where a government official "determines the content" of speech, or substantially "regulate[s] the content of what is or is not expressed," such expression is attributable to the state. *Rosenberger*, 515 U.S. at 833. In such a case, the problem is that the state has put its thumb on the scales to tilt otherwise private speech in a religious direction—which both places the state's imprimatur on the views expressed and interferes with the speaker's free speech rights. "[N]either the power nor the prestige" of the state may "be used *to control, support or influence* the kinds of prayer the American people can say." *Engel*, 370 U.S. at 429 (emphasis added).[12]

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[11] See also *Edwards* v. *Aguillard*, 482 U.S. 578, 615-616 (1987) (Scalia, J., dissenting); *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring in judgment).

[12] In other state action contexts, the Court asks whether the state has compelled an activity or provided "significant encouragement" to act in a certain manner, so as to warrant the conclusion that the state is responsible for the resultant activity. *Blum*, 457 U.S. at 1004. A neutrality inquiry under the Free Speech and Establishment Clauses, however, "requires an equal protection mode of analysis." *Walz* v. *Tax Commission*, 397 U.S. 664, 696 (1970) (Harlan, J., concurring). Thus, it is appropriate that the Court ask not only whether the state has *compelled* religious activity, but whether it has intentionally favored private religious expression over private secular expression.

Weisman illustrates the use of state power to bend speech in a particular religious direction. As noted above (at 8), the school principal both decided to have prayers at graduation and hand picked a clergyman to deliver them. But "[t]he State's role did not end with the decision to include a prayer and with the choice of a clergyman." 505 U.S. at 588. The principal also provided Rabbi Gutterman with "a pamphlet entitled 'Guidelines for Civic Occasions,'" and advised him that an "[a]ppropriate" prayer "should be nonsectarian." *Id.* at 581. Thus, even if Rabbi Gutterman had been selected based on neutral criteria, the principal's decision to "direc[t] and contro[l] the content of the prayers" still rendered them "attributable to the State." *Id.* at 587, 588. As the Court noted in *Engel*, the state "is without power to prescribe by law any particular form of prayer which is to be used as an official prayer," and "the fact that the prayer may be denominationally neutral" is irrelevant. 370 U.S. at 430.

II. POLICIES THAT PERMIT SPEAKERS SELECTED ON A NEUTRAL BASIS TO DELIVER A MESSAGE OF THEIR CHOICE AT PUBLIC EVENTS DO NOT VIOLATE THE ESTABLISHMENT CLAUSE.

As we have shown, *Weisman* rightly invalidated a school district's practice of inviting hand-picked clergy to deliver what it deemed an "appropriate" prayer at its graduation ceremonies. The district's criteria for selecting the speaker

were decidedly non-neutral, and the state virtually dictated the content of the message. It is no exaggeration to say that Rabbi Gutterman was enlisted to deliver a state message.

This is not to say, however, that religious speech offered at public events is necessarily unconstitutional. Where private speakers are selected on a genuinely neutral basis and retain control over their remarks, principles of *both* free speech and nonestablishment require the state not to meddle with their messages. As Justice Souter observed in *Weisman*, a different case would have been presented "[i]f the State had chosen its graduation day speakers according to wholly secular criteria, and if one of those speakers (not a state actor) had individually chosen to deliver a religious message." 505 U.S. at 630 n.8 (concurring opinion). In those circumstances, one cannot reasonably infer "that the government brought prayer into the ceremony 'precisely because some people want a symbolic affirmation that government approves and endorses their religion.'" *Id.* at 630.

For example, if a school principal regularly invited the student valedictorian to deliver a message of her choice at graduation, it would not violate the Establishment Clause if she prayed or made religious remarks. Academic standing is a secular basis for choosing a speaker, and the state is exercising no influence on her message. Thus, the Ninth Circuit properly sustained a policy permitting students chosen on academic grounds to deliver "an address, poem, reading, song, musical presentation, prayer, or any other pronouncement" at their graduation. *Doe* v. *Madison Sch. Dist.*, 147 F.3d 832 (9th Cir. 1998), vacated as moot, 177 F.3d 789 (1999). Since each speaker "decide[d] individually the content of her pronouncement," and school administrators

did not "censor any presentation or require any content," any religious speech was not attributable to the state. *Id.* at 834.[13]

By the same token, the Third and Ninth Circuits have properly invalidated policies authorizing students to vote on whether to have prayer at graduation. *ACLU* v. *Black Horse Pike Regional Bd. of Educ.*, 84 F.3d 1471 (3d Cir. 1996) (en banc); *Harris* v. *Joint Sch. Dist.*, 41 F.3d 447 (9th Cir. 1994), vacated as moot, 515 U.S. 1154 (1995). Holding a vote on whether to have a prayer is *not* neutral—there will be *prayer* or there will be *no speech at all*. See *Chandler* v. *James*, 180 F.3d 1254, 1259 (11th Cir. 1999) (distinguishing a policy treating secular and religious speech alike from one "which 'permits' private parties to speak, but then limits their speech to prayer or other devotional speech"), pet'n for cert. filed (Dec. 2, 1999) (No. 99-935). By definition, speakers are not free to direct their remarks, and such a practice merely delegates to the student body a decision the state itself may not lawfully make. See *City of Cleburne* v. *Cleburne Living Center*, 473 U.S. 432, 448 (1985); *cf. Engel*, 370 U.S. at 429 ("the ballot box" does not excuse an establishment); accord *Weisman*, 505 U.S. at 596; *Schempp*, 374 U.S. at 225-226.

By contrast, the Fifth Circuit erroneously sustained a policy permitting students to vote to have a "nonsectarian, nonproselytizing prayer" at graduation. *Jones* v. *Clear Creek Indep. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992). Such policies are doubly invalid: in limiting the vote to whether to have *prayer*, the state favors religious speech; and in requiring prayer to meet "inclusiveness" standards, the state

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[13] For similar reasons, we believe *Guidry* v. *Broussard*, 897 F.2d 181 (5th Cir. 1990), which upheld a school district's decision to censor a valedictorian's religious graduation speech, was wrongly decided.

controls its content. A view of the Establishment Clause that "require[s] the [state], in order to avoid a constitutional violation, to scrutinize the content of student speech, lest the expression in question—speech otherwise protected by the Constitution—contain too great a religious content," "raises the specter of governmental censorship, to ensure that all student [statements] meet some baseline standard of secular orthodoxy." *Rosenberger*, 515 U.S. at 844. "[O]fficial censorship" is "far more inconsistent with the Establishment Clause's dictates than [is] governmental [authorization] of [student messages] on a religion-blind basis." *Id.* at 845.

As discussed below (at 28), however, the Fifth Circuit erred in holding that the District's football policy here was "essentially identical" (Pet. App. A10) to its graduation policy. The football policy permits a vote on whether to have a message *or* invocation, and it appears to let students control what they say. Students are as free to use their time to extol the virtues of the late Walter Payton as a great sportsman as to pray for the players' safety. They may suggest a moment of silence out of respect for the students who recently lost their lives at Texas A&M, or they may talk about the value of teamwork. Any religious remarks are not attributable to the state in these circumstances.

Finally, we would note that nothing in the Establishment Clause stands in the way of high school football players who wish to join together and pray, on their own initiative, prior to or after a game. We are not suggesting that public school football coaches may lead such prayers. See *Doe* v. *Duncanville Sch. Dist.*, 70 F.3d 402 (5th Cir. 1995). But just as Reggie White or Cris Carter might gather after the buzzer to give thanks to God for the chance to play, so may students at a public high school. The fact that such prayers take place on a public playing field does not render them attributable to the state, and the Fifth Circuit plainly erred in holding that

the government is responsible for "spontaneously initiated" prayers simply because "school officials are present and have the authority to stop [them]." Pet. App. A38.

III. THE DISTRICT'S POLICY FACIALLY SATISFIES THE REQUIREMENTS OF NEUTRAL SELECTION CRITERIA AND PRIVATE CONTROL OVER CONTENT.

Prior to this lawsuit, the District had "no written policy" on statements at football games. Pet. App. A6. In response to a district court order, it promulgated a policy "to permit students to deliver a brief invocation and/or message to be delivered during the pre-game ceremonies of home varsity football games." *Id.* at F1. The policy's stated purposes are "to solemnize the event, to promote good sportsmanship and student safety, and to establish the appropriate environment for the competition." *Ibid.* To this end, "the high school student council shall conduct an election, by secret ballot, to determine whether such a statement or invocation will be a part of the pre-game ceremonies and if so, shall elect a student, from a list of student volunteers, to deliver the statement or invocation." *Ibid.* "The student volunteer who is selected by his or her classmates may decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." *Ibid.*[14]

The Fifth Circuit invalidated this policy on its face, based on a *per se* rule that "[t]he prayers are to be delivered at *football games*—hardly the sober type of annual event that

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[14] This differs from the policy approved in *Jones* v. *Clear Creek Ind. Sch. Dist.*, 977 F.2d 963 (5th Cir. 1992), which requires that graduation prayers be "nonsectarian" and "nonproselytizing." The District adopted a *Jones* policy as a fallback, which takes effect if a court enjoins its primary policy. App. F1-F2.

can be appropriately solemnized with prayer." Pet. App. A38. Apart from the "singularly serious nature of a graduation ceremony," the court could conceive of no "'event that could appropriately be marked with a prayer.'" *Id.* at A37, A38. According to the court of appeals, the policy was invalid because *any* "[p]rayers that a school 'merely' permits will still be delivered to a government-organized audience, by means of government-owned appliances and equipment, on government-controlled property, at a government-sponsored event, thereby clearly raising substantial Establishment Clause concerns." *Id.* at A24.

Contrary to the reasoning of the Fifth Circuit, the fact that students might deliver a prayer over a "public address system" does not make this a difficult case. *Mergens*, 496 U.S. at 247. Nor is it the least bit troubling that this case involves football games rather than graduation ceremonies. What matters is whether speakers are selected on a neutral basis and retain control over their remarks. On its face, the District's policy satisfies these requirements. See *United States* v. *Salerno*, 481 U.S. 739, 745 (1987) (plaintiff must show that "no set of circumstances exists under which the [policy] would be valid").

A. Holding An Election Is A Facially Neutral Means Of Selecting A Speaker.

Holding a student election to determine who will deliver a message or invocation at District football games is, on its face, a neutral means of selecting a speaker. The policy does not prescribe factors that students should consider in voting, and any student may run for election to speak. Students are free to cast their votes for any number of reasons—including popularity, public speaking ability, and athleticism. Such criteria are more subjective than selecting speakers based on factors such as their grades. But it would be improper, in analyzing a facial challenge, to speculate that primarily non-

neutral factors would motivate student voting. *Cf. Jaffree*, 472 U.S. at 74 (O'Connor, J., concurring in judgment) (stating that "a court has no license to psychoanalyze the legislators"). Insofar as the policy allows students to vote for neutral reasons, it must be upheld on its face.

One can conceive of circumstances where an election is nothing more than a pretext for a vote on having prayer. But the Establishment Clause does not erect a bar preventing students from voting on a speaker for a school event simply because the speaker might make religious remarks. If, based on neutral criteria (*e.g.*, public reputation), the students voted to invite the Reverend Jesse Jackson to deliver a pre-game address, it would not violate the Establishment Clause if his message had openly religious themes. See David Heinzmann, *Jackson Warns Youths to Avoid Violence*, CHI. TRIB., Nov. 24, 1999, at 1. Nor would it be unconstitutional if the students, again based on neutral criteria (*e.g.*, popularity or athleticism), voted to invite the captain of the football team to make a statement, and he chose to deliver a prayer. The decisive point is that speakers are selected on a neutral basis, and there is no evidence on this record that the policy—adopted during the course of this litigation—has been implemented so as to violate this standard.[15]

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[15] Whether the policy is constitutional on an "as applied" basis is a separate question, and the record in this case, as it now stands, provides no basis for evaluating it. We would note, however, that the District's former practice of inviting the "student council chaplain" to pray before games (Stip., ¶ 123) is not, standing alone, dispositive of whether its *current* policy is constitutional. If it were, no government body could ever correct an unconstitutional practice. In addition, in any "as applied" challenge, the burden would be on *the plaintiffs* to prove that the election was intended by the authorities (or understood by the students) as tantamount to a referendum on prayer rather than, as it appears on its face to be, a neutrally structured opportunity for speech.

B. The District's Policy Facially Satisfies The Requirement Of Private Control Over Content.

The District's policy also facially satisfies the requirement of private control over content. As noted above, the policy permits student speakers to "decide what message and/or invocation to deliver, consistent with the goals and purposes of this policy." Pet. App. F1. Students may recite a poem on school spirit, or they may remind the players that "It doesn't matter whether you win or lose; it's how you play the game." They may denounce taunting and cheating, or they may note the importance of respecting one's opponent. They may discuss the value of physical fitness to a well-rounded education, or they may encourage the players to shake hands after the game. Over time, it is reasonable to expect that the policy will result in messages representing the "whole spectrum" of student views—some "religious," some "antireligious," and some that are "neither." *Rosenberger*, 515 U.S. at 841.[16] That prayer is one option does not mean the District has violated the Establishment Clause.[17]

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[16] In *Adler* v. *Duval County School Board*, 851 F. Supp. 446, 453 n.9 (M.D. Fla. 1994), vacated as moot, 112 F.3d 1475 (11th Cir. 1997), for example, the court reported that during the year after *Weisman* was decided, a school district's policy permitting students to vote on whether to have a student "message" at their graduation resulted in both secular and religious messages.

[17] We acknowledge that the District's policy could be applied so as to authorize District officials to judge whether student remarks are "appropriate" to "solemnize the event." Pet App. F1. For example, if the District were to pre-screen religious content to ensure that it met this standard, this would raise constitutional concerns under the Free Speech *and* Establishment Clauses. See pp. 20-21, *supra*. Here again, however, there is no evidence in this record that the policy has been applied to interfere with student control of religious content.

We believe that it would improve the policy to omit the term "invocation." Yet this may be read as nothing more than a clarification that both types of speech, secular and religious, are allowed. Moreover, the District deliberately broadened its policy *beyond* that required by governing Fifth Circuit precedent—to permit messages *or* invocations. Insofar as the Court is concerned that the policy have a secular purpose, it thus appears to be a good faith effort to ensure that religious and secular speech are treated evenhandedly. *Cf. Mergens*, 496 U.S. at 249 (plurality opinion) ("Congress' avowed purpose—to prevent discrimination against religious and other types of speech—is undeniably secular.").[18]

The fact that only one student speaks at each game does not make the chosen speaker a state actor. *Cf. Mergens*, 496 U.S. at 236 (Equal Access Act is triggered "even if a public secondary school allows only one 'noncurriculum related student group' to meet"). That there is a limited opportunity for speech *does* make it more important that the state "ration or allocate the scarce resources on some acceptable neutral principle." *Rosenberger*, 515 U.S. at 835. But the state has an obligation to be neutral in either event, and the "premise that the [state] could discriminate based on viewpoint if demand for [time to speak] exceeded its availability is wrong." *Ibid*. Just as "government cannot justify viewpoint discrimination among private speakers on the economic fact of scarcity" of space or money, neither can it justify unequal treatment because of scarcity of time. *Ibid*.

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[18] The policy further serves "the legitimate secular purpos[e] of solemnizing public occasions." *Lynch* v. *Donnelly*, 465 U.S. 668, 693 (1984) (O'Connor, J., concurring); see *Jaffree*, 472 U.S. at 75, 78 n.5 (O'Connor, J., concurring in judgment).

C. If There Is No Reading Of The District's Policy Under Which Permitted Speech Is "Student-Initiated" And "Student-Led," The Court Should Dismiss The Writ As Improvidently Granted.

Finally, if the Court finds that there is *no* reading of the District's policy under which permitted speech is genuinely "student-led" and "student-initiated," it should dismiss the writ as improvidently granted. The Court dismisses a petition as improvidently granted where "[a]n important issue [is] found not to be presented by the record," or where "the record may not be 'sufficiently clear and specific to permit decision of the important constitutional questions involved in th[e] case.'" ROBERT L. STERN ET AL., SUPREME COURT PRACTICE 259 (7th ed. 1993) (citing authorities).

In its order granting the petition for certiorari, the Court reformulated the question presented as follows: "Whether petitioner's policy permitting student-led, student-initiated prayer at football games violates the Establishment Clause." It can only resolve this question if speech under the policy is truly "student-led" and "student-initiated." Thus, if the Court finds that there is no reading of the policy under which this is true—*i.e.*, if the state initiates or directs all speech under the policy—then "the basis upon which review was permitted is in fact nonexistent." STERN, *supra*, at 258. In such circumstances, the proper remedy is to dismiss the writ as improvidently granted.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be reversed, and the policy upheld on its face. Alternatively, the writ should be dismissed as improvidently granted.

Respectfully submitted.

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